

2. **Each criterion proposed for exempting stations from EEO reporting immunizes stations from antidiscrimination enforcement and offers no countervailing public benefits**

NMTC's Tennessee Study found that staff size, market size, the size of the minority population in the market and the percentage of the minority population in the market were each uncorrelated with stations' minority percentages of parity for top four category and fulltime employment. See p. 52 supra. This finding illustrates that EEO achievements and failures occur irrespective of demographics and station size. "Small" stations, small market stations, and stations in racially isolated markets can make no claim of entitlement to "relief" based on their past performance relative to other stations.

We have already set out several reasons why an EEO exemption is unwise and unlawful, and why stronger EEO enforcement is constitutionally compelled. However, assuming that each of our previous arguments was entirely without merit, and that some exemption is appropriate, we set out below why each of the NPRM's proposed criteria to trigger an exemption is not the right criterion.^{229/}

^{229/} We do not believe that any exemption is appropriate. The only reasonable case for an exemption might be that a company has completely integrated its workforce at all levels by both race and sex, and has eliminated all traces of discrimination and its present effects from every aspect of its operation (recruitment, selection, hiring, work assignments, working conditions, training, promotion, compensation, discipline and termination). In other words, the company should be an "EEO Superperformer." See pp. 357-366 infra. However, the case for such an EEO exemption even for such a company is weak, since company management and company policies may change, and without EEO review, such a change would never be discoverable. That is why airlines do not earn safety inspection exemptions by not crashing their planes, and why sausage makers do not earn salmonella inspection waivers because nobody dies eating a braunschweiger.

a. Staff size

The NPRM asks whether staff size should be an exemption criterion "on the assumption that stations with small staffs have few hiring opportunities, and limited financial, personnel and time resources available for recruiting[.]" Id. at 5164 ¶21.

Each of these assumptions is unfounded and is not an appropriate basis for deregulation. The Tennessee Study found that smaller stations have relatively more hiring opportunities than larger ones. See p. 51 supra. The positions available at smaller stations tend to be the very positions which are essential to the entry of previously excluded groups such as minorities and women. Id. "Financial, personnel and time resources available for recruiting" should not be a bar to recruitment and recordkeeping by any station. These activities consume virtually no time and money when designed into the personnel functions any station routinely performs. See pp. 103-106 supra.

Not only is each assumption underlying a staff size exemption invalid, there are at least five sound policy reasons why staff size should not be used to trigger an EEO exemption.

First, the number of stations which would be EEO-exempt under a staff size criterion is unknown, owing to the consequences of job consolidation flowing from the growth of the superduopolies now permitted by the Telecommunications Act. See pp. 65-67 supra. Even when the number of potentially exempt stations is known, the disaggregation of a duopoly's or superduopoly's EEO data by the current Form 395 and the Commission's computer program (the "Duopoly Database Problem") would cause large multiple station combinations to be erroneously treated as though they are composed of several discrete smaller ones. See pp. 99-100 supra.

Second, a staff size criterion would hit minorities and women hardest if they have the misfortune of residing in smaller markets or states -- the very places where most new entrants to broadcasting must begin their careers. See Declaration of Dr. James Hawkins, Exhibit 8 hereto. In Tennessee, for example, and even without accounting for the Duopoly Database Problem or the other effects of the Telecommunications Act, "[p]roposals to deregulate EEO compliance for 'small' stations would exempt 45% of the currently non-exempt Tennessee stations if the size cutoff were ten fulltime employees, 58% of the currently non-exempt Tennessee stations if the size cutoff were fifteen fulltime employees and 70% of the currently non-exempt Tennessee stations if the size cutoff were twenty fulltime employees." Tennessee Study; see p. 47 supra. An increase in the station size cap would likely affect no stations in New York City, Los Angeles or Chicago, and relatively few in Miami, Atlanta or Denver -- but it would cut the heart out of EEO enforcement in employees' point of entry markets like Nashville, Chattanooga and Knoxville.

Third, a staff size exemption would impede the efforts of larger stations which seek to promote diversity. See p. 169 n. 202 supra; cf. Keyes, 413 U.S. at 189. Broadcast employees often gravitate from smaller stations to larger ones as they develop experience and job tenure. Consequently, when minorities and women are denied a meaningful opportunity to enter this small-to-large station pipeline, the larger stations will inevitably be forced to hire from relatively less diverse pools of experienced persons.

Fourth, a staff size exemption would not only cause discrimination at the exempted stations to go unpunished (see pp. 176-188 supra), it would eliminate a principal deterrent to discrimination at larger stations as well. That deterrent is every station's awareness that discrimination can result in the loss of a license to broadcast. The issuance of a hearing designation order is the single greatest attention-getting device available to the Commission: when an EEO case goes to hearing, discriminators and potential discriminators listen. If the incidence of hearing designation orders is reduced, discrimination at stations of all sizes in the industry will increase.

Fifth, a staff size exemption would allow many large stations to avoid EEO responsibilities simply because they happened not to employ enough fulltime persons in their license renewal year. Put another way, "size" is a moving target. As we have pointed out, many "small" stations aspire to become "large" stations in future years. See p. 69 n. 78 supra. Thus, if an exemption is based on a station's size in a particular year, that exemption would continue throughout the renewal term even if the station operates during most of the renewal term with twice the number of employees which would trigger an EEO exemption. While this problem could be partly cured by requiring stations to file EEO programs whenever a Form 395 shows that they have exceeded the size exemption level, a much

simpler, easier to administer and less "burdensome" approach would be to leave the size cap unchanged.^{230/}

Assuming that a station size criterion is employed, the number of fulltime employees who happen to be working at a station in one pay period in first quarter of a calendar year should not be used as the size measurement because that number does not accurately reflect the number of persons affected by equal opportunity. First, since the the post-Christmas season is a slow period for radio and television, stations are often understaffed during this period. Second, parttime people -- some of them working for as many as 35 hours per week -- are not counted toward the size cap even though they often contribute substantially to diversity and even though they are often more likely to be subject to discrimination than fulltime employees. Indeed, at many stations, most of the employees work parttime. Owing to the consolidation of broadcast jobs attendant to the Telecommunications Act, the number of stations heavily laden with parttime staffs is likely to grow considerably. Often, these are the stations where

^{230/} Our experience in reviewing EEO programs shows that common wisdom among broadcasters is that if they operate below the EEO size cap at renewal time and later rise above that cap, they are EEO-exempt throughout the license term. However, if they operate above the EEO size cap at renewal time and later fall below it, they become EEO-exempt and do not have to operate an EEO program for the time period when they remain below the size cap. The Commission should clear up this confusion by declaring that a station must operate an EEO program, and have that program on file with the Commission, whenever its Form 395 staff size exceeds the size exemption cap. Among other things, such a clarifying ruling would eliminate the likelihood that a discriminator like the one in Beaumont could fire all its minority employees but escape EEO accountability simply because its discriminatory actions also had the effect of reducing its size below the EEO exemption cap.

minorities and women first gain an opportunity to become employed. It is not uncommon for entry level persons to begin their employment on a parttime basis and work up to a fulltime job when they prove their mettle and a fulltime job becomes available.

That is why we are proposing the use of a much more accurate measure of a station's size, tailored to the goals of the EEO Rule: the number of "person-months" on a station's annual payroll. Under this measurement, parttime people would be pro-rated. See pp. 323-324 infra. The use of a "person-month" unit is far more accurate and fair as a measure of station size than the number of fulltime employees in January.^{231/}

^{231/} For example, the Commission could declare that a station whose payroll in a calendar year included more than 80 person-months is EEO-exempt. Under the five fulltime employee exemption level now in effect, a station with five fulltime employees working throughout the calendar year, with no parttime employees, would have an annual payroll with sixty person-months. If that station also employed four people year-round each working twenty hours per week, the station would have annual payroll with 84 person-months.

Another approach was suggested by the U.S. Commission on Civil Rights in its Comments in the 1976 EEO proceeding. The Civil Rights Commission suggested that if the five-employee threshold were changed, it should become "five to 10 employees, regardless of their full- or part-time status, whichever is more inclusive." Nondiscrimination - 1976, 60 FCC2d at 240 ¶35.

b. Market size

The NPRM asks whether "a qualifying factor [should] be market size, because, as some have suggested, stations located in small markets may have difficulties competing for employees with stations in larger markets, which can offer higher salaries and greater career opportunities[.]" Id. at 5165 ¶21.

Many of the reasons why staff size is not an appropriate EEO exemption criterion are also reasons why market size is not an appropriate exemption criterion.^{232/} However, the principal reason given in the NPRM for a market size exemption is actually precisely the reason why no market size exemption is appropriate. As Commissioner Barrett noted in his separate Statement to the NPRM, minorities and women commonly begin their careers in small markets. Id. at 5187; see Declaration of Dr. James Hawkins, Exhibit 8 hereto.

The NPRM's suggestion that small market stations must offer lower salaries than large market stations proves too much because every market, except New York and Los Angeles, are employee feeders to larger markets. To the extent that a station in Springfield, Missouri is "burdened" by the fact that it pays employees less than stations in St. Louis and loses employees to stations in St. Louis, the same station in St. Louis is equally burdened by the fact that it pays employees less than stations in Chicago and it loses employees to stations in Chicago. Only in the very smallest markets are there no feeder markets, and these smallest markets already have EEO "relief" tied directly to the very issue (dollars)

^{232/} See pp. 191-192 supra (discussing how an EEO exemption for smaller stations would impede larger stations' pursuit of diversity and eliminate a deterrent to discrimination).

raised in the NPRM in its contemplation of a small market exemption.^{233/}

The NPRM's assumption that small market broadcasters cannot compete with large market broadcasters in the salaries they can offer is flawed. Small market broadcasters seldom complain (except to the FCC) about the misfortune of having to pay out less money in salaries than larger market stations pay for the same labor. Small market stations can pay less because they often have a captive labor force not enjoyed by larger market stations. If there are only three or four broadcast employers in town, a broadcast professional making her home in that town must either (1) accept whatever deal one of them offers, (2) leave broadcasting, or (3) leave town. In larger markets, employees have other options.^{234/}

More fundamentally, the assumption that salary levels make EEO compliance more difficult is flawed, because low salary levels discourage all races and each sex equally. See p. 265 infra. Throughout American history, minorities and women have been well accustomed to producing the same work as others for less pay. If anything, minorities and women are disproportionately available for

^{233/} See NPRM, 11 FCC Rcd at 5182 (a station's location in a market below 200th in size would be a mitigating factor for forfeiture amounts).

^{234/} Furthermore, in larger markets, employees often have unions. Unions are seldom present in small market broadcasting, allowing most small market broadcasters to pay their workers less than union scale.

low salary work, because in an industry infected with discrimination, the choice jobs are often reserved for White males recruited through word of mouth by their friends in the business.

A market size exemption would be illogical as well as unfair. Under a market size exemption, a station with 40 employees would be EEO-exempt simply because it happens to be the dominant facility in a small market, while another station the same size in a larger market would not be EEO exempt. That is unfortunate because the dominant station in town is often the most important station for EEO purposes: it may offer the greatest number of job opportunities to broadcast professionals who live in that community. Indeed, EEO compliance is even more important in small markets than in large ones because, "[i]n a community served by only one outlet, the public interest focus is perhaps sharper and the need for airing complaints often greater than where, for example, several channels exist." UCC I, 359 F.2d at 1004. Broadcast listeners and viewers should not be deprived of an opportunity to enjoy diverse programming simply because they choose to live in a smaller market.

A market size criterion would be especially inequitable because some states have few small markets and some have few large markets.^{235/} There is no logic in requiring virtually every

^{235/} The Tennessee Study found that "[p]roposals to deregulate EEO compliance for "small market stations" would exempt 7.6% of the currently non-exempt Tennessee stations if the market size floor were 20,000, 12.9% of the currently non-exempt Tennessee stations if the market size floor were 25,000, 37.6% of the currently non-exempt Tennessee stations if the market size floor were 50,000, and 44.8% of the currently non-exempt Tennessee stations if the market size floor were 100,000. See p. 47 supra.

station in New Jersey to do its part to eliminate discrimination and its present effects, while exempting every station in Mississippi from these responsibilities.

c. **Size of local minority workforce and use of alternative labor force data**

The size of the minority workforce is not needed as an exemption criterion because it is already taken into account in evaluating the reasonableness of a licensee's EEO Program.^{236/} The zone of reasonableness is based upon the presence of minorities in the workforce; thus, the Commission's evaluations of a station's record is already tied directly to the availability of minorities in the workforce.^{237/}

Furthermore, stations in markets with low minority availability already have no EEO requirements for minorities. A higher exemption level would wipe out the EEO Rule in many states.^{238/}

^{236/} See, e.g., Historic Hudson Valley Radio, Inc. (MO&O and Forfeiture Order), 11 FCC Rcd 7391, 7395 ¶14 (1996).

^{237/} A low percentage of minorities in the workforce is also considered in calculating forfeiture amounts. When a station has violated the EEO rule, the forfeiture amount may be adjusted downward where minorities constitute less than 6% of the relevant labor force. See NPRM, at 5182.

^{238/} The Tennessee Study found that "[p]roposals to deregulate EEO compliance for stations in markets with 'small minority populations' must be evaluated by first recognizing that 33.0% of Tennessee stations are not required to have an EEO program for minorities, inasmuch as they are situated in markets with less than 5% minority population. If minority population percentage were used to trigger an EEO compliance exemption, and the minority population percentage floor were set at 10%, 56% of Tennessee's stations would be exempt. If the minority population percentage floor were set at 20%, 88% of Tennessee's stations would be exempt." See pp. 47-48 supra.

Minority labor force availability is probably the most invidious factor proposed as an EEO exemption criterion. This factor would cut the heart out of the diversity rationale underlying the EEO Rule. Embedded within this proposed criterion is the assumption that the EEO Rule is merely a means to provide programming to minorities. It disregards the fact that diversity of viewpoints benefit all Americans. See Waters, 91 FCC2d at 1265.

Above all, the Commission should not be sending the message to broadcasters that thinly populated minority groups are entitled to less civil rights protection than densely populated ones. Such a message would turn on its head the most basic principle of civil rights -- that small and defenseless groups must be protected from the majority's self-interested actions. Minorities in communities like Salt Lake City, Spokane, Billings or Cheyenne are often isolated and vulnerable, and most in need of the full integration of the communications media to ensure that they are accepted and respected.

d. **Broadcasters' claims
of "limited resources"**

EEO compliance costs almost nothing in real dollars, and almost nothing relative to a station's revenues during the renewal term. See pp. 103-106 supra. Thus, allowing an arbitrary claim of "limited resources" to be used as a basis for an EEO exemption amounts to a statement that EEO may be consigned to the lowest level of resource-allocation priority. Moreover, "limited resources" are subjective and virtually impossible to evaluate, except perhaps when a station is bankrupt.

EEO only costs a broadcaster money when it has violated the EEO Rule and must pay a forfeiture. However, the Commission already takes limited resources into account in establishing forfeitures.^{239/} There is no need for further "relief."

^{239/} See, e.g., Diamond Broadcasting of California, Inc., 11 FCC Rcd 7388 (1996) and Dennis Elam, Trustee, 11 FCC Rcd 1137 (1996) (waiving EEO forfeitures in Chapter 7 bankruptcies); Transnational Network, Inc., 92 FCC2d 324 (1982) (reducing non-EEO forfeiture from \$8,000 to \$100 for station in Chapter 11 bankruptcy); First Greenville Corp., 11 FCC Rcd 7399 (1996) (reducing EEO forfeiture from \$37,500 to \$6,000 based in large part on solvent station's claim of financial difficulty).

B. In addition to reduced reporting requirements, the other types of relief proposed in the NPRM will also seriously weaken EEO enforcement

1. Weakened EEO recruitment

The NPRM proposes to repeal the section of the EEO Rule which requires recruitment whenever a job is available.^{240/} Id. at 5166 ¶24. Twenty years of FCC experience and thirty-two years of EEOC experience have proven that it is a mistake to allow an employer to fill selected jobs outside of the equal opportunity process. Without an express requirement that focused EEO activity occur whenever a job is available, some licensees will revert to the former industry practice of using the inherently discriminatory "old boy network" of word of mouth recruitment for certain jobs.^{241/} When challenged, they may claim that recruitment would "just slow things down."^{242/} Alternatively, they may claim that they needed to fill a job imminently, an easy excuse since almost every broadcast job must be filled quickly, and because it takes only a few minutes to initiate a few calls, faxes or e-mails to recruitment sources. Excuses for failure to recruit are simply unacceptable, since there is no shortage of minority and female applicants for jobs with broadcasters who build a reputation for

^{240/} 47 CFR §73.2080(c)(2) (stations are expected to "[u]se minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation. For example, this requirement may be met by...." (emphasis added). See Emmis FM Broadcasting Corporation of Boston, FCC 96-298 (released July 16, 1996) at 3 n. 3.

^{241/} See, e.g., Walton (Decision), 78 FCC2d at 875.

^{242/} See Gaines, 10 FCC Rcd at 6491 ¶21 (discussed at p. 178 n. 219).

hiring minorities and women.^{243/}

Contrary to our initial doubts, MMTC's research demonstrates that there is merit to the suggestion that broadcasters can materially increase minority representation in applicant pools by conducting recruitment at job fairs.^{244/} NPRM at 5166 ¶24. Certainly, nothing stops a broadcaster from attending job fairs now.^{245/} Moreover, jobs fairs should ideally be a supplement to,

^{243/} The Tennessee Study found that "[t]he fact that five stations each generated more than fifty minority applicants demonstrates that minority applicants are in plentiful supply. Apparently, they are attracted to the stations which apparently have built a reputation for employing them. Similarly, the fact that twelve stations each generated more than fifty female applicants demonstrates that female applicants are in plentiful supply. The fact that the same pattern of high recruitment numbers for a handful of stations obtained for women as obtained for minorities demonstrates that the high number of minority applicants at a handful of stations cannot be attributed to format considerations alone." See pp. 50-51 supra.

^{244/} The Tennessee Study found that "[t]he correlation between participation in job fairs and minority applicant pool percentage of parity suggests that stations participating in job fairs are succeeding in building applicant pools in which minorities are better represented. This finding lends support to the FCC's contention that the use of job fairs may be a useful alternative means to ensure that minorities are more proportionally represented in applicant pools." See p. 52 supra.

^{245/} The Tennessee Study found that only 12% of the stations reported participation in a job fair in the year before they filed their 1996 renewal applications. Furthermore, only 27% of the stations reported offering training or internships during this period. The study concluded that "[t]hese low numbers for participation in optional but obviously useful EEO initiatives suggest that an EEO regime premised on "self-regulation" would be a failure." See p. 50 supra.

Even when a job fair is given to broadcasters as a gift from a community group, far too many broadcasters don't even send a subordinate. On April 20, 1996 the Ft. Lauderdale NAACP Communications Committee held a job fair. Approximately 130 job candidates attended; almost all were minorities. The job fair was widely publicized with the enthusiastic support of the South Florida Radio Broadcasters Association.

[n. 245 continued on p. 203]

rather than a substitute for, focused and pro-active recruitment whenever a job is open,^{246/} since job fairs usually are not strong sources of experienced candidates.

If very small stations are permitted to use job fair participation as a substitute for in-depth recruiting (certainly, no others should have this option) the Commission should proceed with care to ensure that job fair attendance does not become a meaningless exercise (like ascertainment was for some broadcasters). Licensees should be expected to use job fairs to develop a pool of applicants from which minorities and women are meaningfully represented. Licensees should attend at least four job fairs a year, as the NPRM suggests. Id. Resumes should be kept current (e.g., three months old or they're considered stale). A management employee rather than a subordinate should represent the station, and that person should be expected to interview candidates, not just collect a stack of resumes, leave, and later claim that each resume represents an "applicant" to the station. Finally, the station should keep records on job fairs (location, date, sponsor, and station representatives in attendance).

245/ [continued from p. 202]

In the Miami-Ft. Lauderdale broadcast market, there are over 50 broadcast licensees; yet only twelve radio stations and three television stations showed up at the job fair. Furthermore, only nine licensees regularly send job notices to the Ft. Lauderdale NAACP. Interview with Al Calloway, Chair, Ft. Lauderdale NAACP Communications Committee, by David Honig, May 6, 1996.

246/ See BBC, 556 F.2d at 62-63 (station claimed it used the State Employment Service and the Special Assistant to the Governor of Virginia, but actually its "contact" was limited to the passive acceptance of referrals. Its program as to minority organizations involved "waiting for them to come to it....Such passivity is not what was envisioned by the Commission when it set out broadcasters' affirmative action obligations.")

2. Employment benchmarks

The NPRM proposes to permit some licensees to abstain from filing, submitting, or even retaining most recruitment and hiring records if their employment profiles met certain "benchmarks" for most of the license term. Id. at 5166-67 ¶25. The NPRM assumes that "if a station's employment profile bears a reasonable relationship to the local workforce, it is appropriate to presume that the licensee's EEO efforts are adequate." Id.

This proposal is well intentioned but unwise, as expressed with surgical accuracy in Commissioner Barrett's Separate Statement:

I will not support the implementation of a quota-like standard that seeks to alleviate a licensee's obligation to recruit minorities and women in the event that it consistently meets a specific employment profile. Such a measure would simply amount to a quota, which would severely undermine the efforts-based nature of the Commission's EEO rules. I also believe that such an approach could also increase the risk of judicial challenge. More importantly, I am concerned that such a measure would not give licensees the incentive to recruit or hire minority and female employees beyond the established targeted number.

Id. at 5171 (Separate Statement of Commissioner Andrew C. Barrett).

First, by replacing the efforts-based approach to EEO regulation^{247/} with a numbers-based approach, the employment benchmarks proposal would play into the hands of enemies of minority and female opportunity who want to see the EEO Rule fail constitutional scrutiny. "Employment benchmarks" would "reward" broadcasters purely because they have hired particular numbers of minorities and women, and that's wrong. The beauty of the EEO Rule

^{247/} Broadcast EEO - 1987, 2 FCC Rcd at 3974 ¶50.

now is that it's not numbers-based except where the use of numbers is absolutely necessary;^{248/} it's not a quota, it doesn't even have the appearance of being a quota, and individual hiring decisions can be race-neutral. Employment benchmarks would ruin all of that.

Second, employment benchmarks would impede the effectiveness of the EEO Rule in promoting diversity, because they would prevent the Commission from scrutinizing whether licensees have recruited, hired, trained and promoted minorities and women into senior positions. As Commissioner Ness has emphasized:

The modest advances in broadcast employment that have been made by minorities and women deserve recognition. However, I find that the overall results are inadequate, particularly in top positions such as group manager, general manager, station manager, and sales manager. One of my goals is to ensure that there are meaningful opportunities for minorities and women not only to be hired, but also to rise to the top management positions at communications companies. These promotional opportunities are essential to provide experience and to position minorities and women for ownership. Experienced management is a critical component to attract media financing.

EEO Report - 1994, 9 FCC Rcd at 6327 (Separate Statement of Commissioner Susan Ness).^{249/} Employment benchmarks do not measure the placement of minorities and women in positions where they can do the most to promote diversity. It is simply not true that "if a station's employment profile bears a reasonable relationship to the

^{248/} EEO statistics are useful as one of several pieces of evidence which might suggest whether discrimination or other EEO violations did, or did not occur. See pp. 222-228 infra. Industry aggregate EEO statistics are useful to allow the Commission to determine when the EEO Rule may be repealed. See pp. 35-44 supra.

^{249/} See pp. 313-320 infra.

local workforce, it is appropriate to presume that the licensee's EEO efforts are adequate." NPRM at 5167 ¶25.

Third, employment benchmarks would eliminate broadcasters' incentive to do anything more after they've exceeded the benchmarks. EEO efforts should be more than just "adequate." Id. Employment benchmarks would build the EEO house upside down -- placing the ceiling where the floor should be. As the Commission declared in WINFAS, Inc., 5 FCC Rcd 4902, 4906 n. 13 (1990), "[a] licensee's efforts to recruit, employ, and promote minorities and women are to occur regardless of the extent of their presence at the station."250/

250/ In Carolina Christian Broadcasting, Inc., 3 FCC Rcd 1907, 1910 (1988), the Commission explained that a "cause for concern is the licensee's statement that it will continue its newly implemented recruitment strategies until minority employment reaches a significantly higher level. Whereas the exact nature of recruitment efforts can vary over time, we wish to emphasize that we expect licensees' affirmative recruitment and promotion efforts to continue even after our processing guidelines are met. They are simply processing guidelines and no more. They are not quotas nor do they establish upper limits for minority and female employment. There is no reason for a licensee's vigorous efforts to diminish at 50%, 75% or even 90% of parity." See also Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provision of the Cable Communications Policy Act of 1984 (Report and Order), 102 FCC2d 562, 623 (1985) ("EEO R&O - 1985"), Statement of Commissioner Dennis R. Patrick, Dissenting in Part: "[a] focus on efforts, not results, is also compelled by policy considerations. Numerical quotas encourage employment decisions based upon race or sex rather than qualifications.... Equally distressing, however, is the fact that numerical quotas can be used as a 'safeharbor' by those who achieve the numerical goal and, thereafter, lessen affirmative action efforts. There is nothing magic about achieving 50% of parity, for instance. It was not the intent of Congress, nor is it our intent, that companies whose employment profile exceed 50% of parity be able to cease EEO efforts. The statute requires continuing EEO programs by all cable companies."

Fourth, employment benchmarks would allow the Beaumont or Independence type of EEO violation to go undetected.^{251/} If a superduopolist operates several stations in a market, the entire superduopoly might exceed an EEO benchmark, and thus evade EEO review, even if the superduopolist relegates virtually all of the minority employees to just one or two of the stations.

Fifth, employment benchmarks would not save broadcasters any work. If a broadcaster passed the benchmarks one year, shut down its EEO program, and then (as is inevitable) failed them in another year, it would have to re-create its EEO program from scratch. It is much more time-consuming to start than to operate or improve an EEO program. Thus, employment benchmarks would not "reduce burdens" (sic) on the industry.

We sympathize with the purpose of this proposal -- that broadcasters who do far more than the minimum expected of all licensees should be rewarded. The question is "rewarded with what?" Later in these Comments, we propose a number of appropriate rewards. See pp. 346-364 infra.

^{251/} Beaumont, 854 F.2d at 501 (licensee employed a one-third minority staff, then fired the minorities); Independence, 53 FCC2d at 1161 (licensee operated AM-FM combination and routed all of the minority employees to the AM station). Indeed, a licensee who hired minorities, but only to spin records, and who broadcast exploitative programs such as numbers tips disguised as Biblical citations, would have lost his license 20 years ago but would be an EEO hero today if employment benchmarks were in effect. See United Broadcasting of Florida, 55 FCC2d 832 (1975), recon. denied, 60 FCC2d 816 (1976).

C. Proposals to reduce "burdens" must be structured to ensure increased minority and female recruiting and to require each station to remain individually responsible for EEO compliance

1. Joint recruitment programs

The NPRM suggests that broadcasters might be given credit for conducting recruitment efforts jointly. Id. at 5169 ¶32-33.

Nothing precludes broadcasters from incorporating collaborative efforts into their individual EEO efforts, and broadcasters certainly should do so. However, no broadcaster should be permitted to simply delegate its recruitment duties to others and walk away from its EEO responsibilities. Those duties include include selection, work assignments, working conditions, compensation, training, and promotion. The Commission should make it clear that these tasks certainly cannot be delegated.

The construction of an applicant pool is an individualized step each broadcaster must undertake on its own. At some level, this step involves competition with other broadcasters for the best talent available; thus, collaboration with other broadcasters is inherently at odds with the goal of an effective personnel recruitment program. While a broadcaster certainly can engage the services of a joint committee to attract new talent to the market, each individual broadcaster should be expected to interview its own preferred candidates for its own jobs.

Furthermore, no broadcaster can attract the best talent without nurturing a reputation as an equal opportunity employer. To the broadcast professional, potential employers are not fungible. Like buying a house or choosing a spouse, an individual's choice of a place to build one's career is intensely personal. It takes into account the experiences of others

similarly situated, and the genuineness of opportunities for training and advancement, job tenure and job satisfaction. As the Tennessee Study illustrated, broadcasters who develop a strong EEO reputation succeed in attracting many times more minority and female applicants than do other broadcasters. See pp. 50-51 supra.

The development of a reputation as a fair employer cannot be achieved without the personal initiative of individual broadcasters. Broadcast professionals are all too aware that just a few years ago, the majority of broadcasters discriminated at one level or another against minorities, women or both. Broadcast professionals also know that far too many broadcasters today either discriminate, do only the minimum necessary to comply with the EEO Rule, or do nothing to help repair the effects of past industrywide discrimination or even the effects of their own past discrimination. It takes thoughtfulness, patience and hard work for a station to build a reputation which will convince the broadcast professional that the station has moved beyond the industry's past and possibly the station's own past, and that the station -- unlike most -- is an aggressive, pro-active EEO employer.

A broadcaster's reputation is nurtured by avoiding insulting form letters,^{252/} and instead cultivating long term and genuine

^{252/} Broadcasters' individual reputations are more critical to EEO success than many broadcasters realize. For example, it has become a common practice by many broadcasters to send minority and women's organization one of two types of form letters, whose origin appears to be a dated NAB publication. One form says, in effect, that the station has no job available now, but that the station is an equal opportunity employer and the referral source is encouraged to send candidates to the station for the nonexistent jobs.

personal contacts with community leaders, participation in events organized by community groups, and, above all, developing a track record of hiring minorities and women, giving them genuine responsibility and treating them fairly.^{253/}

Thus, the participation by an individual broadcaster in a state broadcaster's association job fair would always be appropriate. Delegation of the task of recruitment to a faceless joint broadcasters committee might not always be appropriate.

^{252/} [continued from p. 209]

The other form identifies a particular job, but contains a "response card" to be sent back to the broadcaster to verify that the referral source received the notice. Often, the notices are only for lower level positions. The referral source soon realizes that the broadcaster does not feel her (and her constituency) worthy of knowing about the choicest positions.

Most referral sources throw both form letters in the garbage. The first is little more than an attempt to evade the EEO Rule by allowing the station to tell the FCC it had "contacted" community groups, even in a meaningless and impersonal way. The second treats referral sources like children with a report card to be signed by a parent and returned to the teacher. It is perceived as little more than "license renewal insurance" and not as a genuine attempt to recruit minority and female employees. (Imagine getting a letter from a station saying "Hello, we want you to advertise with us. Presently, we have no inventory! However, please send along your requests for airtime. By the way, please return this 'Response Card' so we can prove to the FCC that we wrote to you.")

When the community groups don't respond, the broadcaster will blame them, claiming it did all it could to recruit whenever a job is open; see 47 CFR §73.2080(c)(2). The Commission, quite properly, gives broadcasters no credit for these "efforts." See KTEH Foundation, 11 FCC Rcd 2994, 2997 ¶23 (holding that "[s]uch a general notification unrelated to particular job openings is not a substitute for recruitment contacts with sources designed to elicit minority and female applicants as each vacancy occurs.")

^{253/} As we have pointed out, after the death of ascertainment, EEO contacts between stations and community groups are often the only remaining bridge of personal contact between some broadcasters and minority groups. See pp. 81-82 supra. It would be a shame if that communication bridge is replaced with the impersonal missives of intermediaries.

To summarize: Joint recruitment efforts should be encouraged with these caveats:

1. Like individual station recruitment efforts, joint recruitment should focus on specific jobs. Frivolous statements that "our members are EEO employers but they have no jobs open now...." should be discouraged.
2. Joint recruitment efforts should be aimed at increasing the proportional representation of minorities and women in station applicant pools, rather than being aimed at attracting larger numbers of White male candidates whose sheer numerosity would swamp the chances of minority and female candidates to receive employment.
3. A clearinghouse must be structured and staffed to receive job notices from broadcasters as soon as a job becomes available. The clearinghouse should then immediately transmit the job notice to a range of sources. Time delays between the notifications of job openings by a station to a clearinghouse and by the clearinghouse to the referral sources should be kept to a minimum. Thus, for example, a clearinghouse which sends a monthly list of openings to referral sources would be ineffective, since few broadcast jobs stay open that long. Many only stay open for a few days or even less.
4. Resumes of potential candidates should be transmitted promptly to each station which has jobs of the type the job candidate wants and is qualified to perform. This will ensure that when a job is available, each station will have immediate in-house access to the resumes of qualified candidates.
5. The individual broadcaster must retain responsibility for interviewing and evaluating each job candidate personally.
6. Each broadcaster must also undertake individualized efforts to build bridges to referral sources, both to solidify its community reputation as a fair employer and to place itself in the best competitive position to attract the best talent.
7. Each broadcaster should maintain and operate an aggressive EEO program focused on each of the many steps in the employment process (e.g., training, compensation, promotion) which occur after the recruitment stage.

2. Training programs

It is unfortunate that so few stations provide any kind of training.^{254/} Thus, we enthusiastically support the Commission's proposal to give credit for participation in minority training and internship programs. NPRM, at 5170 ¶34.

We caution that training does not mitigate discrimination. A person's right not to be discriminated against is personal to her. It is not effectuated because an employer happens to be more than fair to others.

The Commission should make it clear that training should be meaningful and apportioned without discrimination.^{255/} Almost every station checks "Yes" on the "on the job training" box on Form 396. Yet that training may be no more than what every station has to do to prepare new employees to perform their specific duties. Moreover, on the job training tends not to be distributed equally.

^{254/} The Tennessee Study found that only 27% of the stations reported offering training or internships in the year before they filed their 1996 renewal applications. See p. 50 supra.

^{255/} In BBC, 556 F.2d at 63, the station only had a one-week program in one summer in which a handful of youth were allowed to tour the station and one or two were briefly allowed to operate a camera. The Court concluded that given the ministerial nature of this "training", "it appears extremely unlikely (and at least uncontested) that WTVR has taken reasonable steps to insure an increasing number of blacks and women among its managerial and skilled employees."

It tends to be apportioned in a discriminatory way.^{256/}

Licensee-initiated training efforts are the best way to correct the present effects of past discrimination.

Nondiscrimination - 1969, 18 FCC2d at 245. In particular, programs such as those operated by the Foundation for Minority Interests in Media and cable's Walter Kaitz Foundation are outstanding efforts whose scope should be magnified by a factor of ten. We are recommending that extensive and outstanding training efforts should be expressly rewarded. See pp. 357-364 infra.

^{256/} This scenario is all too familiar: minorities or women become so expert in a job that they can do their supervisor's job, but they will never be promoted into that job. When the supervisor retires or is promoted, the minority or female subordinate has the honor of providing "on the job training" for their supervisor's successor. See "Blacks Tend to Get Shut Out of On-the-Job Training Programs," 12 Journal of Blacks in Higher Education (Summer, 1996), p. 57 (reporting on data from the Bureau of Labor Statistics which show that in 1993, new White workers, on average, trained for 116 hours while Blacks received only 80 hours of training. For workers who were retrained or needed to learn a new skill to perform their jobs, Whites received an average of 18 hours of training and Blacks received eleven hours.)